In

Term, 1899

Supreme Court of the United States.

OCTOBER TERM, A. D. 1899.

MOFFETT, HUDNUT & CLARKE COMPANY,

Petitioner,

against

THE CITY OF ROCHESTER, et al., etc.

Respondents.

ANSWER TO PETITION FOR WRIT OF CERTIORARI.

JOHN F. KINNEE,

Attorney for Respondents,

45 City Hall Building,

Rochester, N. Y.

Supreme Court of the United States.

MOFFETT, HODGKINS & CLARKE COMPANY,
Petitioner,

AGAINST

The CITY OF ROCHESTER; GEORGE W. ALDRIDGE, WILLIAM W. BARNARD and JOHN U. SCHROTH, composing the Executive Board of the City of Rochester,
Respondents.

OCTOBER TERM, A. D., 1898.

Answer to petition of Moffett, Hodgkins & Clarke Company for writ of certiorari requiring the Circuit Court of Appeals in the Second Circuit to certify to the Supreme Court of the United States, for its review and determination, the case of Moffett, Hodgkins & Clarke Company against the City of Rochester, George W. Aldridge, William W. Barnard and John U. Schroth, composing the Executive Board of the City of Rochester.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES.

The respondents, the City of Rochester, George W. Aldridge, William W. Barnard and John U. Schroth, composing the Executive Board of the City of Rochester, answering the petition of the petitioner herein, respectfully show to this honorable court:

I. This suit was brought by the petitioner against the respondents for the purpose of procuring the reformation and rescission of a bid made by the petitioner for constructing a steel pipe conduit and appurtenances for the City of Rochester, and enjoining the respondents from declaring forfeited the proposal bond accompanying the bid, and from in any manner suing upon or attempting to enforce or collect the bond.

II. The petitioner in its bill of complaint alleges that clerical errors were made in its proposal for the work, and sought relief upon those grounds.

III. The respondents denied that such clerical errors were made and asked that the bill be dismissed. Issue having been joined, the parties proceeded to take their proofs and on a trial and hearing in United States Circuit Court held in and for the Northern District of New York before Judge Alfred C. Coxe, a decree was rendered by him in favor of the petitioner for the relief prayed for in the bill of complaint.

IV. Thereupon respondents appealed from such decree to the United States Circuit Court of Appeals for the Second Circuit. Thereafter such proceedings were had in said court, that on December 7, 1898, a decision was rendered reversing the decree of the United States Circuit Court with costs, and with instructions to the court below to dismiss the bill.

V. The argument in the United States Circuit Court of Appeals was had before Judges Wallace, Shipman and Lacomb, and the decree of the lower court was unanimously reversed. Two opinions were written, one by Judge Wallace and the other by Judge Shipman.

VI. Judge Wallace in his opinion held that the only clerical mistake shown to have been made was the result of gross negligence upon the part of petitioner, and that it had prepared its proposal with a haste which

was unnecessary and inexcusable. Judge Wallace also held that it was manifest that petitioner did not intend to give the Executive Board an opportunity to correct the mistakes and award the contract on the corrected basis, and further, that the mistake was unilateral and could not be corrected by a Court of Equity.

Judge Shipman's opinion was based upon the former propositions. It was not held in either opinion that the errors were honestly made, but Judge Wallace in his opinion stated that the actions of petitioner were "well calculated to excite distrust on the part of the board and induce its members to believe that the alleged mistakes were an afterthought, conceived when the complainant had become convinced by studying the proposals of its competitors that it could not profitably carry out the contract on the terms proposed."

Judge Shipman held that the errors were not what can properly be called mistakes; that they were the result of negligence. The opinion of Judge Wallace does show that petitioner called the attention of respondents to one of the alleged mistakes, but that petitioner did not ask to withdraw its bid and that its actions thereafter were such as to excite distrust in the minds of the members of the board. The fact of petitioner calling attention of respondents to this alleged mistake is not mentioned in Judge Shipman's opinion.

VII. The United States Circuit Court of Appeals has not based its decision upon the ground that petitioner's mistakes were unilateral and that therefore a Court of Equity has no power to relieve petitioner, but it has decided that the mistakes of petitioner were the result of its own gross negligence and carelessness and that petitioner's default was not occasioned by the clerical errors, but that it was unwilling to carry out the contract at the corrected prices.

The facts as stated in the petition herein are not in all particulars as found by the United States Circuit

Court and the United States Circuit Court of Appeals, and are not in all particulars admitted by respondents, The real facts of the case, as shown upon the trial, are as follows:

The City of Rochester, through its executive board, the department of the city government having sole charge of the water-works system of the city, on December 9, 1892, advertised for proposals for the construction of an additional water line in connection with its water-works system (p. 144). The improvement consisted of the construction of a water conduit from the city to Hemlock Lake, the source of its water supply, situated about 30 miles distant south from the city. The work comprised (1) contract No. 1, so-called, the construction of a masonry water conduit about 12,000 feet long; (2) contract No. 2, the construction of a riveted steel-pipe conduit 38 or 40 inches in diameter about 140,000 feet long, beginning at the north end of the above-mentioned masonry conduit, to the city; (3) contract No. 3, the construction of a cast-iron conduit 36 inches in diameter and about 140,000 feet long, beginning at the north end of the above-named masonry conduit, and being an alternative to the preceding No. 2, except the furnishing of the 36-inch iron pipe and specials; (4) contract No. 4, the furnishing of about 140,000 lineal feet of 36-inch cast-iron pipe, special castings, being an alternative to the riveted steel pipe aforesaid, No. 2.

The printed pamphlets which appear in the record at Exhibit 1A, page 144, and Exhibit A, page 390, are the forms in which bids were to be submitted for contracts No. 1 and 2, upon which petitioner bid, and which comprise a continuous line of work from Hemlock Lake to the city, consisting partly of a masonry conduit and partly of a riveted steel pipe conduit.

Petitioner claims to have made mistakes in bidding on contract No. 2. These alleged mistakes consist in

bidding fifty cents instead of seventy cents for earth excavation in open trenches under route B, and $1.50 instead of $15 for earth excavation in tunnel, which together aggregate $63,800.

The work under contract No. 2 was submitted for prices along two different routes over a length of about 8,000 feet of the whole distance of 140,000 feet, and designated as route A (p. 150) and route B (p. 169). Route A was located in the alluvial flats through which Honeoye creek meandered, and involved several crossings of the existing and former channels of the creek (p. 145). Route B was located wholly on the west side of the creek and avoided the crossings by following the course of lateral valleys for some distance and then returning to the west bank of the creek by means of a masonry conduit and tunnel (p. 145).

Petitioner claims to have made errors in bidding on the following items in route B:

"*d.* For all earth excavation in open trenches or pits for the masonry and pipe conduit entrance and outflow chambers, gate-vaults, blow-offs, pipe-overflows, bridges, railroad crossings, creek crossings, and culverts, carried under said conduit, including bracing and sheeting, back filling of trenches and masonry, making embankments and other final disposal of the excavated material, with haul of 1,000 feet or less, bailing and draining, and all incidental work, the sum of fifty cents ($.50) per cubic yard" (p. 169).

"*h.* For all earth excavation in tunnel, including all neceseary bracing, timbering, lighting, ventilating, removal and back filling, and other final disposal of the excavated material, with haul of 1,000 feet or less, pumping, bailing and draining, and all incidental work, the sum of one dollar and fifty cents ($1.50) per cubic yard" (p. 170).

Burlingame had all the facts before him when making his bid. He does not claim to have been ignorant of the prices or quantities. He was not an inexperienced man but a man of 37 years' experience as a

civil engineer, who had been with petitioner over seven years and had had charge of the chief engineering and the general work of the corporation (p. 27). In some instances he made all the specifications and plans, and no man saw the work until finished (p. 55). He says the plans for the Rochester work were not more complicated than need be (pp. 61–64), and that he fully understood them (p. 63). He was given all the assistance that he asked for from the respondents' engineer (p. 65). He had examined the plans as much as necessary (p. 65). He had spent sufficient time in going over the route (p. 66). Thirteen days before the letting he received his first information with reference to the work (p. 32.) Instead of going there directly he visited other places (p. 33). The letting was on Friday at 12 o'clock and on the Thursday night preceding all his memoranda had been made and would have been inserted in the blanks furnished for proposals had he not been delayed by the president of appellee (p. 41, 74). If Moffett had arrived on Thursday night, as he expected, Burlingame says the bid could have been prepared on that night, and the work was really delayed because of Moffett's absence. Moffet does not satisfactorily explain why he did not get to Rochester Thursday night. He claims to have had important business at Boston which delayed him. When he did arrive everything was in a rush (p. 75). The bids were filled out Friday morning after Moffett arrived. Moffett might have scanned the prices as Burlingame inserted them in the bid, but neglected to do so (p. 110). Between them they were preparing the bid, Burlingame inserting prices and Moffett inserting the clause in the pamphlet that they were to be considered together (p. 111). Petitioner's contention is that Burlingame inserted fifty cents for certain class of work where he should have inserted seventy cents, and $1.50 where he should have inserted $15, although it appears that for the latter work petitioner bid one

dollar in another contract for which a bid was submitted at the same time. Respondents contend that these prices were consciously and purposely inserted, and that no mistake was made, but that petitioner presented an unbalanced bid, or that it was guilty of negligence. Burlingame himself, characterizes his acts as those of "gross negligence on my part" (p. 88). He says, "I was careless in allowing the bid to go before the commissioners without my careful scrutiny in going over it again to check it up" (p. 88). And again he says: "I did not give the matter thought and did not not notice it until after the thing was over" (p. 81).

Petitioner's bid was read last. The bid was somewhat unusual in form and gave rise to some criticism. It was on this account laid aside and read after the board had determined to receive it. Both the clerk of board, Mr. Neville (p. 340), and Mr. Kuichling, the chief engineer of the respondents (p. 322), testified positively that petitioner's bid was read after the other bids. Burlingame testified that petitioner's bid was read first (p. 50), but Moffett, the president of appellee, who was present, does not testify upon that point, and the other witness for appellee, Porter, would not swear positively upon the subject, but gave it as his impression that appellee's bid was read before the others (p. 127).

While Burlingame testifies that he rose while appellee's bid was being read and called the attention of the executive board to the alleged mistake in bidding on earth excavation in open trench, he says he did not call its attention to the alleged mistake in bidding on earth excavation in tunnel (p. 84). He is not corroborated by Moffett, but he is corroborated by Porter (p. 122). Porter's recollection of what occurred at the time the bids were opened was not distinct. He could not even swear positively as to the order in which the

bids were read (p. 126). He says that the error was called to the attention of the board by its own clerk, a very unusual proceeding (p. 122). Neville, the clerk who read the bids, denies that there was any such interruption (p. 345).

Petitioner's proposal contained the statement at the head of the prices which it submitted that it had carefully examined the notice of letting, the specifications and the form of contract and bonds, all of which were set out at length in the printed pamphlet in which its bid was submitted; also that it had examined the general plans and locality of the work, and that it fully understood the meaning of the notice, specifications, contract and bonds and would fully comply with all the terms therein mentioned for the prices submitted (p. 158).

The notice of letting, under which petitioner submitted its bid, and which it admits it had "carefully examined" and "fully understood" the meaning of, provided for an option in the executive board of selecting either route A or route B, and between cast-iron and steel pipe, in awarding the contract (p. 145).

The notice also contained provisions with reference to the proposal bond which would be required of the petitioner, and the provisions of which it complied with, but the obligations of which it now seeks to repudiate (p. 146).

The notice of letting also provided that after a bid had been delivered to the executive board or its clerk it could not be withdrawn:

"Each bid must be signed with ink, by the person or persons making the same, with full names and addresses; and where the proposal is signed by an individual in behalf of a company or corporation, the bid must be accompanied by a properly attested power of attorney or authorization empowering said individual to sign the bid for all members of such company or

corporation. Every bid shall be enclosed in a sealed envelope, indorsed 'Proposal for Performing Contract No. 2, Rochester Water Works Conduit,' and addressed to the Executive Board of the city of Rochester, N. Y., and be delivered to said board, or its clerk. *After having been so delivered the bid cannot be withdrawn*" (p. 147).

The provision of the notice that after delivery, bids could not be withdrawn, was inserted in pursuance of a requirement of the city charter which provided that after the delivery of bids on public work, no bid or bond could be withdrawn or cancelled until a contract for which such bid was submitted, had been made and executed. The following is the language of the act:

"The Executive Board is hereby directed to cause a notice to be published in one or more of the daily newspapers of said city, at least ten days before the letting of any contract for sealed proposals therefor, each to be accompanied by a bond signed by at least two responsible sureties, conditioned that the person, firm or corporation making such bid, if it is accepted, will perform the work or furnish the materials, or both, mentioned in such proposals, and fulfill any contract that may be made with him, them or it, *and the amount specified in the bond shall be recoverable thereon in case the proposer fails to perform the conditions of the bond and its accompanying proposal;* such bids shall be opened on the day named in such notice. Said board may let any contract as it deems for the best interests of taxpayers, but it shall publish all bids received by it, and the persons, firms or corporations to whom contracts are awarded. Such contracts shall be enforceable by and in the name of the city of Rochester, or said executive board as such. *Neither the principal or sureties on and bid or bond shall have the right to withdraw or cancel the same until the board shall have let the contract for which such bid is made, and the same shall have been duly executed.*"

City Charter, § 172.
L. 1890, ch. 561, § 28.

The award of the contract was to be made as soon as practicable after the bids had been opened and read, and after five days' notice of an award the bidder was required to appear before the executive board with his sureties and execute the contract in accordance with his bid, and for a failure to do so, he was to be regarded as having abandoned all intention of executing the contract or performing the work (p. 147).

Under these and other terms and conditions, petitioner submitted its bid on contract No. 2, which appears at pages 134 to 313 of the record. Its bid was in all respects like the bids of other contractors under this contract, except that it was submitted in two pamphlets, in one of which the prices were inserted and in the other the proposal bond. This was done, it is claimed, by petitioner, because the proposal bond was executed in New York by Henry D. Lyman and the American Surety Company, and was not brought to Rochester by John F. Moffett, the president of petitioner, in time to have the prices inserted, which its engineer had been preparing in Rochester. But these two pamphlets were made one by language inserted in one of them by Mr. Moffett himself to the following effect:

"See annexed schedule of prices in duplicate form of contract which are made part of this bid as though incorporated herein" (p. 134. Ex. IB).

At any rate the informality in petitioner's bid was its own fault and might be and was waived by the respondents.

The fact that the bids on both contracts Nos. 1 and 2 were enclosed in a single wrapper is unimportant. This informality, like that of submitting the bids in two pamphlets, was petitioner's own fault and might be and was waived by the respondents. Burlingame said that the two pamphlets were submitted jointly as

one contract (p. 75). Petitioner cannot take advantage of its own wrong. The bids were properly addressed (p. 98).

Petitioner's bid was read, received and treated in all respects as the bids of other contractors (pp. 323, 340). The executive board is a department of the city of Rochester, and is controlled by statutory provisions. One of these is that it shall keep minutes of its proceedings (Laws 1880, chap. 14, § 153). It is also authorized to appoint a clerk whose duty it is to keep a record of its proceedings (id. § 154):

"The executive board shall have power to appoint a clerk of the board, to hold during its pleasure, and to fix his compensation, and he shall keep a record of all the proceedings of the board, and perform such other duties as the board may prescribe" (§ 154).

The board can act only by resolution. Any expression of opinion on the part of individual members would not be binding on the board and these appellants.

Petitioner's bid was accompanied by a proposal bond executed by Henry D. Lyman and the American Surety Company of New York city with the petitioner as the principal by which they covenanted and agreed that for a failure and default on the part of petitioner to enter upon a written contract in accordance with its bid, they would forfeit as liquidated damages the sum of $90,000 from the date of such default (p. 137).

The bids were opened by the executive board on December 23, 1892, at 12 o'clock. They were read and laid aside for the further consideration of the board.

On January 6, 1893, the executive board let contract No. 1 to the lowest bidder. Petitioner submitted a bid upon this work, but was $81,272 above the lowest bidder (p. 500).

On January 12, 1893, twenty days after the opening of its bid, petitioner presented to the executive board a written communication, which appears at page 128 of the record, claiming that there was an express understanding that both contracts Nos. 1 and 2 were to be let together, calling attention to its alleged mistakes in bidding on earth excavation and requesting that both contracts be let to it at its corrected prices or that it might be allowed to withdraw its bid. This statement was evidently presented for the purposes of this litigation which was threatened in the communication itself (p. 131). The complaint charges the executive board with taking "unfair, undue and unconscionable advantage" of the alleged errors set forth in the statement. It was presented solely for the purpose of making such a claim. Respondents insist that the statement was presented in bad faith and bears internal evidences of that fact. It protests that there was an "express understanding" that both contracts were to be let together and yet does not express a willingness to take the contracts except at the corrected prices (p. 131). Petitioner must have known that contract No. 1 had been awarded when its statement was filed. It alleges errors in route B, but does not offer to take the contract on route A. The statement bears on its face evidences of insincerity and bad faith (see statement, p. 128).

There was no understanding, as claimed in the statement, that the contracts Nos. 1 and 2 were to be let together. Notice for bids required separate bids on four pieces of work (pp. 144, 386). There is no intimation in the notice for proposals or in the bid submitted that an award would be made to the lowest aggregate bidder. Each proposal is complete in itself. Petitioner bid on the masonry conduit (contract No. 1) and the steel-pipe conduit (contract No. 2), but bids were also received for a cast-iron conduit (contract No. 3, upon which petitioner did not bid), and

furnishing cast-iron pipe and special castings (contract No. 4, upon which petitioner did not bid). Petitioner had no reason to suppose that the riveted steel pipe upon which it bid would be chosen rather than the cast-iron pipe upon which it did not bid, and its engineer's testimony shows that the claim that the contracts were to be let together was without any foundation whatever, and was advanced, like its claim of mistakes, as a specious plea to avoid the effect of its bid. This claim of petitioner is exploded by the testimony of its own engineer which respondents quote as a sample of the tissues upon which petitioner's claim for relief in this action is based.

Burlingame testified upon this subject as follows:

"Q. What facts were there, or what information was there that led you to believe that these two contracts were to be let as one? A. We had the general idea that the thing was going together; that there was a certain amount of work to be done; that one man could do the whole thing, or one concern, in better shape than if there was two or three hands, and merely taking it in a general way I supposed the whole thing would go together. I had no knowledge of it specially.

"Q. You had received no such information? A. No, sir.

"Q. There was nothing to intimate to you from the papers that such was the case? A. No, sir.

"Q. On the other hand, there was a separate contract for contract No. 1, and for contract No. 2? A. Yes, sir.

Q. "And you were particularly requested in the notice to contractors in each of the pamphlets to put your bids in an envelope and address them to the executive board separately? A. Yes, sir.

"Q. And with all that information and with all these facts before you, you still came to the conclusion that these two contracts were to be let as one? A. I did not come to any special conclusion about it, I supposed" (p. 85).

The executive board refused to allow petitioner to withdraw its bid or to award the contracts to it at its corrected prices, and on January 12, 1893, adopted resolutions which appear at pages 90 and 91 of the record, accepting petitioner's bid and requiring it to attend on or before January 19, 1893, to execute the contract in accordance with its bid by route B of contract No. 2, and providing that for a failure to attend and execute the same it would be regarded as having abandoned the work, and further directing the clerk to cause notice of the award of the contract to be made upon petitioner. The clerk of the executive board went to New York city and served copies of the resolution mentioned upon the president of petitioner (p. 89).

There is no evidence of "unconscionable" conduct on the part of the executive board. If any presumption is to be indulged in from the acts of the executive board it must be favorable to the board. Its members are public officers and are presumed to discharge their duties in good faith. No presumption of bad faith will be indulged in. As public officers every presumption is in their favor. Its act in awarding the contract will be presumed to be in good faith in the absence of proof to the contrary.

Sections 6, 142 and 153 of the charter of the city of Rochester provide:

"The officers of said city shall be one mayor, one treasurer, *three members of the executive board*, two judges of the municipal court, one police justice, one supervisor for each ward, one alderman for each ward, one constable for each ward, and one commissioners of common schools for each ward; all to be elected by the electors of the city, by ballot, as hereinafter provided; one city clerk, one auditor, one city attorney, one overseer of the poor, three assessors, one sealer of weights and measures, one city sur-

veyor, two police commissioners and one police clerk, to be appointed as hereinafter provided, and such other officers as are, by this charter or other law, to be elected or appointed" (§ 6).

"There shall be an executive board of the said city which shall consist of three members, who shall be electors and freeholders of the said city, chosen at each biennial charter election by the electors of the city, each to hold his office for the term of two years, commencing on the first day of January next after his election, except as hereinafter provided. The members now in office shall be members of the executive board until the expiration of their terms of office, respectively (§142).

"Each member of the executive board shall take the oath of office required of other city officers within five days after being notified of his election or appointment; and a failure to do so shall be deemed a refusal to serve. Each of said members shall give a bond in such amount and with such sureties as the mayor may approve, conditioned for the faithful performance of his duties. Any member of the said board may be removed by the common council for official misconduct by a vote of two-thirds of all the members elected to the said council, but notice in writing shall be given of the charges made, and he shall have an opportunity of being heard in his defense. The said board shall make monthly reports to the common council of their expenditures and the condition of the funds under their control. They shall keep a record of their proceedings and of all receipts and expenditures, which shall be published in a least one daily paper in said city. On or before the first day of June in each year the said board shall present to the common council a statement of the moneys needed by such board for the fiscal year, specifying the purposes for which it shall be used. It shall be the duty of the common council, after receiving such statement, to raise such an amount of money as the common council may deem necessary for the said board, with the other general city taxes. Such moneys and the moneys received for water-rates and the use of water shall only

be paid out by the order of the common council on the certified resolutions or orders of the said executive board, except as otherwise provided" (§ 153).

Petitioner answered the resolutions of the executive board awarding the contract to it by commencing this action praying for a reformation of its bid, or that its proposal be entirely rescinded ; that the respondents be required to enter into contract No. 1 and contract No. 2 at the corrected prices, or that the bids for the whole work be rejected ; and praying for a perpetual injunction restraining the respondents from declaring the petitioner in default with respect to its proposal for contract No. 2 on route B, and from declairing its proposal bond forfeited, and from suing or attempting to enforce its collection ; and also praying for a temporary injunction to the same effect (pp. 14-15). A temporary injunction was granted to the effect prayed for (p. 133)

Thereafter contract No. 2 was awarded to the bidder next above petitioner, which bid was $220.596 above that of petitioner's for the same route ; the route selected being route A (p. 51).

VIII. The questions of law arising in this case, which are questions relating to the power of a court of equity to rescind a contract upon account of a mistake arising frora negligence and to the prompt action necessary to be taken by a party upon the discovery of a mistake to have it corrected, have been passed upon by this court and decided the same as in this case.

Grymes vs. Sanders et al., 93 U. S., 55-61.

This case does not involve questions of gravity and importance or any matter affecting the interests of the nation in its internal or external relations, and it is not of such importance that this court should issue a writ of *certiorari* to review it.

In re Woods, 143 U. S., 202.

Lau Ow Bew, petitioner, 141 U. S., 583.

If any error has been committed, it is merely one in the judicial determination of a question within the jurisdiction of the Circuit Court of Appeals, and not important in its immediate effect nor far-reaching in its consequences, and therefore this court will not review it.

American Construction Co., vs. Jacksonville, Tampa and Key West Railway Co., 148 U. S., 372–387.

IX. The United States Circuit Court of Appeals held that the conduct of petitioner compelled the city's agents to go forward and complete the award of contract number two, in accordance with the terms of the next lowest bidder. The Court certainly considered the fact that respondents were enjoined from believing petitioner in default, but decided that petitioner's acts forced respondents to let the contract to another (See Judge Shipman's Opinion).

X. The decree of the United States Circuit Court of Appeals is that the decree of the lower court be reversed, with instructions to the court below to dismiss the bill. This is not a final judgment, and for that reason the petition should be denied.

Chicago & Northwestern Ry. Co. vs. Osborne, 146 U. S. 354.

XI. If petitioner has any defence to the proposal bond, it will have an opportunity to present it in a court of law when an action is brought to enforce the bond.

It is evident from the circumstances that this suit in equity was begun solely for the purpose of delaying the commencement of an action upon the bond by respondents; and petitioner, having been suc-

cessful in keeping respondents out of their rights for a period of about six years, now makes application to this Court to review the case, not with the hope of ultimately receiving a decision in its favor, but with the design of postponing the day of judgment. Respondents' witnesses may die, some of their records may be destroyed by fire, or numerous other things may happen which would weaken their proofs and give petitioner a chance to defeat an action brought upon the bond. Petitioner, well knowing these facts and aware that every day of delay makes it more difficult for respondent to successfully maintain such an action, now asks this court to aid it in its efforts to defer the commencement of an action by respondents.

Wherefore, Respondents respectfully pray that the petition may be denied.

THE CITY OF ROCHESTER; GEORGE W. ALDRIDGE, WILLIAM W. BARNARD and JOHN U. SCHROTH, composing the Executive Board of the City of Rochester, by

JOHN F. KINNEY,

Their Attorney.